No. 94-1614



In The

# Supreme Court of the United States

October Term, 1994

STATE OF WISCONSIN,

*Petitioner,*

v.

CITY OF NEW YORK, ET AL.,

*Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### CASES CITED

This brief responds to the arguments of those parties opposing Wisconsin's, Oklahoma's and the United States' petitions for certiorari,[1] that review should be denied because the judgment of the court of appeals is not final and because it is correct. This brief does not address respondents' contention that the decision of the Second Circuit is not in conflict with decisions of the Seventh and Sixth Circuits. The conflict between the circuits is adequately addressed in the petitions of Wisconsin and the other petitioners.

## 1. The Importance Of The Case Makes It Appropriate For Review, Notwithstanding The Non-Final Nature Of The Court Of Appeals' Judgment.

Respondents do not disagree that the case is one of profound national importance, going to the validity of the allocation of political representation among, if not within, the states following the 1990 census. Nor do they contend that the case fails to present the issue of whether statistical disputes concerning the best way of taking the decennial census shall continue into the next century as the domain of protracted, individual district court litigation. However, respondents argue that review is not appropriate because it would be interlocutory.

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[1] *State of Oklahoma v. City of New York, et al.*, No. 94-1631; *United States Department of Commerce, et al. v. City of New York, et al.*, No. 94-1985. Given that the census's constitutional purpose is to provide state population totals for apportioning seats in the House of Representatives, it is significant that Arizona, the only state to appeal the district court's judgment which would gain congressional representation under the June 1991 estimates, has not opposed review. As noted in Wisconsin's petition, California, the only other state standing to gain representation under the June 1991 adjusted numbers, elected not to appeal the district court's judgment.

Nearly seven years after the commencement of this litigation, half of the decade has now passed for which the 1990 census has constitutional relevance. If the decision of the court of appeals is allowed to stand, the district court will conduct further proceedings to determine whether the Secretary's decision not to substitute statistically estimated census numbers for the 1990 population totals reported by the President for apportioning Congress and used by the states in redistricting satisfies the court of appeals' heightened standard of review.

If the district court reaffirms the decision not to adjust under the heightened standard, then Wisconsin will not have suffered any injury from the denial of its petition. On the other hand, the court of appeals' decision will stand as precedent for the year 2000 census, at least in the Second Circuit.[2] Unless the Congress or the Commerce Department directs the use of statistical estimation procedures to "correct" the results of the year 2000 census, there is little reason to believe that similar lawsuits will not be brought by states and municipalities seeking to compel those statistical methods believed to increase their population shares. Moreover, if the decision of the Second Circuit goes unreviewed, Congress' ability to direct the taking of the next census will be hindered by the absence of clear legal standards governing the exercise of its express constitutional authority.

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[2]The decision of the court of appeals, if allowed to stand, coupled with the Seventh Circuit's decision in *Tucker v. U.S. Dept. of Commerce*, 953 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), would virtually ensure future census litigation being brought in district courts within the Second Circuit and not in district courts within the Seventh Circuit, which is perhaps the most direct proof of the conflict between the circuits.



The consequences of the district court entering judgment compelling an adjustment of the 1990 census under the Second Circuit's heightened standard of review are even less satisfactory. If the court were to stay its judgment while appeal and review were sought, then Wisconsin would not be harmed by the decision of the court of appeals going unreviewed at this time. But it is difficult to envision a state, such as Arizona, armed with a judgment entitling it to additional representation in Congress, agreeing to an election taking place under the original apportionment while a judgment compelling adjustment was being reviewed.[3] Unless the size of the House of Representatives were expanded, Arizona and California could not elect additional Representatives without a reduction in the number of Representatives elected by Wisconsin and Pennsylvania. Wisconsin could not proceed to elect both eight Representatives, on the chance that a district court judgment compelling adjustment would be affirmed or go unreviewed by the time of the general election, and nine Representatives, on the chance that the judgment would be reversed. Nor could Arizona elect both six and seven Representatives. An unreviewed judgment of the New York district court, based on an unreviewed and heightened standard of review for decisions regarding the decennial census, which has not been adopted by any other court of appeals, does not provide a secure constitutional foundation for

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[3]Respondents' argument that review should be denied because neither the district court nor the court of appeals has addressed the question of the appropriate remedy appears particularly disingenuous. The sole constitutional injury alleged is a claimed loss of representation in Congress, although this does not appear to be an injury that can be claimed by any of the respondents opposing certiorari. If the result of an order compelling adjustment would not be to reapportion Congress, then the claimed injury is not capable of redress.

directing a mid-decade reapportionment of the House of Representatives.

A judgment compelling a change in the official census counts could also trigger litigation in other states to compel congressional or legislative redistricting under the adjusted numbers. The possibility cannot be excluded that some suits would succeed, given the standard of precise mathematical equality in the creation of congressional districts, and given state constitutional requirements that legislative districting plans be based on the decennial census.[4] Until a judgment compelling adjustment was reviewed, a state facing such a challenge would be subject to substantial disruption of its ability to elect Representatives to Congress and to elect and constitute its legislature.

Moreover, while petitioners firmly believe that the Court of Appeals was wrong and the district court, right, and while respondents are equally convinced of the opposite, the possibility exists that this Court would ultimately conclude that neither court was correct, and that the Secretary's decision should be reviewed under a different standard, requiring additional district court proceedings. If further district court proceedings are necessary, the result of the district court applying an incorrect standard of review will be to delay further the final determination of the validity of the census numbers used in apportioning Congress and in establishing state congressional and legislative districts.

[4]*See* Brief of the States of Indiana and Ohio as *Amici Curiae* in Support of Petitioners at 8 n.3.



### 2. The Possibility That Further District Court Proceedings Would Result In A Decision Of The Case Under An Incorrect Standard Of Review Is Significant.

While respondents present the Second Circuit's decision as a straight-forward application of this Court's redistricting precedent, the attempt to transpose the requirement of good faith, arising in the context of the relatively rigid mathematical standard of complete population equality for intrastate congressional redistricting, onto the complex statistical evaluation of the decennial census represents, at best, a new line of constitutional interpretation.

In the case of intrastate congressional redistricting, "Article I, § 2 . . . 'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). The concept of good faith reflects objective feasibility, rather than subjective purpose. In contrast to state redistricting standards, for the 1990 census, there was no rigid formula for determining whether the estimated population totals were better than the original census in the constitutionally relevant sense of improving equality of representation in Congress. Instead, the Secretary was presented with a myriad of complex statistical arguments, subject to intense dispute among statisticians and demographers, concerning the relative distributional accuracy of two sets of numbers, each known with certainty not to represent "true" population totals.

*Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), establishes the standard for reviewing census decisions, which does not employ the burden-shifting device of

congressional redistricting cases, but which instead asks directly whether the challenged decision is consistent with constitutional language and the constitutional goal of equal representation. *Id.* at 2777. If, notwithstanding that standard, the burden-shifting procedure for congressional redistricting cases is to govern review of decisions regarding the taking of the census, then the analogy to state redistricting standards requires that there at least be an express finding that the census resulted in inequality of representation in Congress, and that the adjusted numbers would result in the correct apportionment. *Cf. Id.* at 2778 ("Certainly, appellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal.") The district court did not find that the Secretary had ascertained this, or that the Secretary should have ascertained it, or that the court had itself ascertained it. It is fine for respondents to state what they believe their evidence established at trial, while declining to acknowledge even the least uncertainty or complexity regarding the statistical estimates.[5] The district court expressly found that respondents had failed

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[5]The degree to which respondents' case requires courts to referee complex disputes among statisticians and demographers is demonstrated by respondents' reliance on trial testimony interpreting the Census Bureau's loss function analyses as the apparent factual support for their repeated assertions regarding the census's purported malapportionment of Congress. *See* Respondents' Brief at 19. The Secretary's review of the ability of loss function analysis to measure the "loss" resulting from the use of two imperfect estimators, given that true values are unknown, Pet. App. 185-93, was, in fact, one of a number of statistical considerations weighed in deciding against adjustment. The district court upheld the Secretary's consideration of the loss function results and methodology. Pet. App. 77-78. The court of appeals neither adopted nor referred to respondents' interpretation of the loss function analyses as demonstrating congressional malapportionment.



to illustrate affirmatively the superior accuracy of the adjusted counts at the national, state or local level for any reasonable definition of accuracy. Pet. App. 78.

The court of appeals' decision, whose heightened standard has the potential of compelling a mid-decade reapportionment of Congress, failed to state that the adjusted numbers would make representation in Congress more equal. The court of appeals' reliance on the district court's "implicit" finding that the census failed to achieve equality of representation, Pet. App. 34, did not discuss the significance of the lower court's findings at the level of congressional apportionment. Beyond this, the court of appeals' discussion of equality of representation in Congress consisted of referring to the Secretary's concern that the "adjustment might not improve distribution of Representatives among the states," contrasting this concern with his concession that the adjusted numbers "would likely bring greater accuracy in the count at the national level," Pet. App. 19, and of finding an absence of good faith in his declining to make an adjustment that would lessen the disproportionate undercounting of minorities, "if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate." Pet. App. 38.

Respondents' need to fashion an explanation for the court of appeals' emphasis on the Secretary's failure to achieve numeric accuracy as nearly as practicable,[6] serves only to underscore the court's misapprehension of

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[6]*See* Respondents' Brief at 41-42 ("The court of appeals did not state that *it* concluded numeric accuracy was more important tha[n] distributive accuracy. Rather, the court gave it as the *Secretary's* conclusion that residual uncertainty about what *he* called 'distributive accuracy' was more important than certainty about 'lessen[ing] the disproportionate undercounting of minorities' -- which *he* called 'numeric accuracy.'")

the relation between concepts of census "accuracy" and the goal of representational equality. The importance placed by the court on the adjusted numbers' perceived superior numeric accuracy was evident in its conclusion "that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable, and that the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities." Pet. App. 39.

The court of appeals' understanding of what the Secretary meant by "distributive accuracy" appears earlier in its decision, where it quoted from the Secretary's definition of the concept as "'getting most nearly correct the proportions of people in different areas.'" Pet. App. 19 (quoting Pet. App. 146-47). Immediately following this definition, the court characterized the Secretary as "declin[ing] to use the adjustments unless not only numerical accuracy but also distributive accuracy would be increased." Pet. App. 19. The court also emphasized that the "adjustments would likely bring greater accuracy in the count at the national level," *id.*, *see also* Pet. App. 38-39, an aspect of census accuracy having no relevance to its constitutional purpose.

Much of respondents' brief is devoted to repeating the theory of their complaint, that "[t]he racial and ethnic character of the differential undercount is relevant because it establishes that the uncorrected census compromises the equality of allocations of political representation based thereon." Respondents' Brief at 50. There is only one way in which the racial and ethnic character of the differential undercount--or, for that



matter, any other character of the undercount[7]--can "compromise" the equality of the allocation of political representation: if the census results in an incorrect apportionment of Congress, and, of equal importance, if alternative numbers would result in the correct apportionment. Again, neither the court of appeals nor the district court nor the Secretary made this finding. The differential undercount is relevant as a highly stylized explanation for why the census *might* affect equality of representation in Congress. It does not tell us *whether* an incorrect apportionment has occurred, or if it has, how to correct it. Confirmation of a differential undercount does not mean that Wisconsin's estimated undercount should be only slightly more than half the undercount for non-Hispanic whites nationally, yet this was one of the results of the estimation procedure giving rise to the state's apparent loss of a House seat. Administrative Record, App. 10, Table 1. Nor does it resolve whether 28 out of 1,392 variance outliers should be excluded during the process of variance "presmoothing." Yet this single methodological decision was alone sufficient to cause Pennsylvania's loss of a Representative. Pet. App. 220. The "residual uncertainty" in the PES estimates, which respondents only barely acknowledge, not only imbued the entire estimation process, but was of direct constitutional significance.

At bottom, the case continues to be about the ability of federal courts to resolve complex statistical

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[7]The complex texture of the PES estimates involved much more than the measurement of differential undercounts nationally. *See*, *e.g.*, Pet. App. 194. For example, the existence of higher undercounts for minority populations does not explain New York's estimated loss and Wyoming's estimated gain in national population shares. Administrative Record, App. 10, Table 5.

disputes concerning the best way of conducting the census under meaningful constitutional standards. A case challenging a process intended to confer finality and certainty on the decennial reallocation of political representation, in which competing statistical measures of "accuracy" are still being debated after seven years, is not one asking whether a particular census decision--in this case, the decision to adhere to the 200 year practice of actual enumeration--was consistent with constitutional language and the constitutional goal of equal representation. Respondents were not asking the Secretary to exercise good faith, but to make a leap of faith. The "implicit" finding of the district court, whose actual judgment was to affirm the decision not to adjust, regarding the census's supposed failure to achieve equality of representation as nearly as practicable, does not provide the basis for further proceedings under a heightened standard of review, whose outcome may be of no less moment than a court-ordered reapportionment of Congress.

## CONCLUSION

The State of Wisconsin respectfully requests that the Court grant its petition for writ of certiorari.

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